97-7521

No. 97-7521 (A-511)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

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SUPREME COURT, U.S.

LESLEY LEE GOSCH

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE:
Mr. Gosch is scheduled to be executed January 15, 1998, at 6:00 p.m.

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16 pp

ORIGINAL QUESTIONS PRESENTED

1. Whether Congress' enactment of the Antiterrorism and Effective Death Penalty Act of 1996 preempts the State of Texas from setting an execution date that abbreviates the statute of limitations period and expedites the process of federal habeas review of a capital petitioner's first federal habeas petition?

2. Whether the State of Texas can circumvent Congress' explicit decree that only states that provide adequate post-conviction procedures and representation are entitled to expedited review of a death-sentenced prisoner's first federal habeas petition, simply by setting an execution date that accomplishes the same end?

3. Whether the State of Texas denies capital habeas petitioners their constitutional due process right of access to the courts by scheduling execution dates prior to initiation or completion of non-successive federal habeas proceedings?

4. Whether a state forfeits its right to carry out a death sentence if state officials, acting with deliberate indifference or malice, subject a condemned inmate to various types of extreme psychological torture, including preparations for repeated unnecessary execution dates, during his eleven-year stay on death row?

5. The federal district court denied petitioner's request for an evidentiary hearing, thereby preventing him from developing his factual allegations of unconstitutional punishment, and held that those allegations, even if true, did not constitute a violation of the Eighth and Fourteenth Amendments. Should this Court grant certiorari, vacate the decision of the court below, and remand for a full and fair evidentiary hearing?

SUPPLEMENTAL QUESTIONS PRESENTED

1. **Whether the Court of Appeals conducted a fundamentally adequate review of Petitioner's non-successive habeas corpus petition consistent with the statutory scheme enacted by Congress, when no member of the panel reviewed the state court record or the record of the state habeas evidentiary hearing, the petition is not frivolous on its face, and the Court of Appeals' cursory and conclusory opinion is entirely devoid of reasoned analysis of any of Petitioner's claims for relief?**

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, issued less than an hour ago, is unpublished. A copy of the slip opinion is attached as Appendix A.

ADDITIONAL REASONS FOR GRANTING CERTIORARI

This case is a tragic example of how willing federal habeas courts, particularly those with jurisdiction over Texas death penalty cases, have become to deny death row inmates even a single meaningful habeas corpus appeal of their death sentences and convictions. As this Court is fully aware, this is not the first such example in a Texas post-conviction capital appeal.[1] But it surely is the most egregious example. If Mr. Gosch's execution takes place within the next hour and a half, it will surely be after one of the most cursory reviews conducted by the federal courts of a death-sentenced inmate's non-frivolous constitutional claims in the post-Furman era.

More than a decade ago, in Barefoot v. Estelle, 463 U.S. 880 (1983), the Fifth Circuit and this Court approved of expedited procedures for the Fifth Circuit's review of a district court's denial of habeas relief in a capital case when a certificate of probable cause was granted by the district court. During the mid-1980s and early 1990s, this Court went further to restrict federal habeas corpus review in other areas, by strictly enforcing its non-retroactivity, procedural default,

[1] See, e.g., Marcia Coyle, *The 33-Hour Habeas Appeal*, NATIONAL LAW JOURNAL, February 3, 1992, at 3 (discussing the case of Texas death row inmate Michael Clark); see also Clark v. Collins, 956 F.2d 68, 69-70 (5th Cir. 1992); Clark v. Collins, No. 92-2036, slip op. (5th Cir. January 16, 1992) (originally designated to be published), depublished, 953 F.2d 642 (5th Cir. 1992). Judge Davis dissented on the grounds that "I am unable to adequately assess Clark's claim of ineffective assistance of counsel without reviewing the pertinent portions of the trial record, which are not now available to me." Slip. Op. at 7.

and abuse of the writ doctrines.[2] Barefoot, Teague, and McCleskey -- all of which have received a tremendous amount of criticism[3] -- were one thing; what went on in the lower courts in this case is an entirely different matter. Under no reasonable construction of the role of federal habeas corpus review can the extraordinarily cursory review by the courts below be deemed fundamentally adequate.

In what is a remarkably short, perfunctory, and wholly conclusory opinion by any standard, the United States Court of Appeals for the Fifth Circuit denied Mr. Gosch all relief within the past hour despite the fact that his Application for Certificate of Appealability has been pending in the Court for less than a day. The Court of Appeals' opinion fails to address in any considered way any of the facts or substantial evidence specific to Mr. Gosch's claims for relief. The reason for this is apparent: According to the dissenting opinion of Judge Garza, **none of the members of the panel have even reviewed the record of the three-day evidentiary hearing that was conducted in state court**. *Gosch v. Johnson*, No. 98-40042, slip op. 6 (Garza, J., dissenting). Bravely, Judge Garza has declared what would be obvious to any reasonable jurist who reviewed Mr. Gosch's federal petition: that his claims for relief -- which include a claim of ineffective assistance of counsel based on the undisputed fact that, due to trial counsel's

[2] See, e.g., Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality); Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Teague v. Lane, 489 U.S. 288 (1989); McCleskey v. Zant, 111 S.Ct. 1454 (1991); Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992).

[3] See, e.g., Judge Donald Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1013 (1993); Chief Judge Gilbert Merritt, *Access to the Federal Courts in Habeas Corpus Cases*, 58 TENN. L. REV. 145 (1990); Anthony Amsterdam, *In Favorim Mortis: The Supreme Court and Capital Punishment*, HUMAN RIGHTS, Winter 1987, at 14, 53-54; Nancy Levitt, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55 (1990); Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991).

inexcuseable negligence, defense testing of forensic review actually produced critical inculpatory evidence that was introduced by the prosecution against Mr. Gosch at trial -- are not frivolous. Under these circumstances, well-established federal law requires that a stay issue and that "reflective study and analysis" be conducted by a federal court.

The federal court's cursory review cannot possibly be squared with the Antiterrorism and Effective Death Penalty Act of 1996. Not even the "expedited procedures" contained in Chapter 154 of the Act -- for which Texas, according to the Fifth Circuit, does not even qualify -- would afford Mr. Gosch such perfunctory review. It is impossible to comprehend how the Fifth Circuit was able to reach any conclusion as to the "reasonableness" of the state court's findings when Judge Garza's revelation that none of the panel members have even read the state court record is undisputed.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. At the very least, this Court should stay Petitioner's imminent execution pending the disposition of this petition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JAN 15 1998
CHARLES R. FULBRUGE III
CLERK

No. 98-40042

LESLEY LEE GOSCH,

Petitioner,

versus

GARY JOHNSON, Director,
Texas Dept. of Criminal
Justice, Institutional Division,

Respondent.

Appeal from the United States District Court
for the Southern District of Texas
(CV-97-126)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

B Y T H E C O U R T:

IT IS ORDERED that petitioner's application for Certificate of Appealability (COA) from the district court's denial of his petition for writ of habeas corpus is hereby denied and his appeal is hereby dismissed; and his petition for stay of execution is likewise denied.

Although the instant appeal, application for COA, and petition for stay of execution have just been filed in this court, this

panel has been tracking petitioner's direct and collateral appeals in state and federal court for years, most recently those in the federal district court for the Southern District of Texas, having timely received and carefully reviewed all filings of petitioner, respondent, and the district court, when and as filed. As such, we are intimately familiar with the facts and law, the arguments of the parties, and the rulings of the district court and its reasons therefor. Consequently, petitioner's eleventh hour filings in this court do not place us in a position of requiring more time than remains before petitioner's scheduled execution in which to make considered determinations and rulings on the matters now before us.

For the reasons set forth by the district court in its extensive explications in its Order filed January 12, 1998, and its subsequent rulings, we agree that the standard of review to be applied here is that set forth in 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), particularly subsections (d)(1) and (d)(2).[1] Our study of the

[1] (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in State court proceedings. (emphasis added) (West Supp. 1997).

careful and exhaustive analysis of the district court in its ruling denying habeas relief and dismissing the petition satisfies us that petitioner's claim was "adjudicated on the merits" in State court proceedings and that the resulting decisions were not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, and did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The overwhelming evidence of guilt in this case indicates that the petitioner planned to kidnap the victim and extort a significant monetary ransom from her husband and that the petitioner murdered the victim in her home by shooting her in the head six times. No claim of factual innocence of the petitioner in this 1985 murder is even remotely suggested. All of petitioner's many claims made in these proceedings, which have dragged on for over eleven years, have been rejected — and correctly so. In this last effort for relief, we perceive the petitioner's claims to be meritless on their face.

First, the petitioner claims that his execution would violate the Eighth Amendment's prohibition against cruel and unusual punishment in light of the three previous dates the State set for carrying out the petitioner's capital sentence. The petitioner alternatively argues that the length of his stay on death row — over eleven years — constitutes cruel and unusual punishment entitling him to relief. But the petitioner's challenges under the

Eighth Amendment do not affect the validity of his conviction or sentence and they are thus not cognizable as a basis for relief under federal habeas corpus. 28 U.S.C. § 2254 (Supp. 1996). Furthermore, the relief that the petitioner seeks is barred by the principles enunciated in Teague v. Lane, 109 S.Ct. 1060, 1075 (1989).

Next, the petitioner asserts that his counsel rendered ineffective assistance during the guilt phase of his trial. Strickland v. Washington, 104 S.Ct. 2052, 2065-68 (1984). The state court correctly determined, however, that the petitioner failed to demonstrate any prejudice resulting from his counsel's allegedly deficient investigatory and trial tactics. Strickland, 104 S.Ct. At 2068 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.").

Finally, the petitioner alleges that the State elicited false testimony at the trial and knowingly allowed such testimony to stand in violation of the precepts set out in Giglio v. United States, 92 S.Ct. 763, 766 (1972), and Brady v. Maryland, 83 S.Ct. 1194, 1197 (1963). To obtain relief under Giglio, the petitioner must demonstrate (1) that the testimony was false; (2) that the government knowingly offered the false testimony; and (3) that the false testimony was material, that is, that "it is reasonably likely that the truth would have affected the outcome of the trial." Id. Without addressing whether the petitioner has established the first two prongs, he has failed totally to

demonstrate the materiality of the allegedly false testimony. Therefore, each of the petitioner's claims for relief lack any possible merit.

Petitioner's post-AEDPA petition seeking habeas relief was properly denied. Moreover, for purposes of COA, petitioner has failed to make a "substantial showing of the denial of a constitutional right," i.e., the issues presented are not debatable among jurists of reason, so petitioner has failed to justify issuance of a COA as well.

IT IS FURTHER ORDERED that, considering the foregoing denial of petitioner's application for COA, his petition for stay of execution is denied. The merits of his petitions for a writ of habeas corpus and for a stay of execution have not presented a substantial case; neither have they made a substantial showing of the denial of a federal right.

COA DENIED; APPEAL DISMISSED; STAY OF EXECUTION DENIED.

EMILIO M. GARZA, Circuit Judge, dissenting:

This matter, reviewed and decided in less than a day, is a prime example of the tail of a pending execution wagging this panel's dog.[1] Although I agree that a preliminary review of Gosch's habeas application and motion for a stay of execution suggests that it lacks merit, this court should be more reticent in deciding any death penalty case so quickly—especially one in which the merits have not been previously reviewed by an appellate court. A thorough and comprehensive review of the record, the briefs, and, in my opinion, oral argument, is required after the passage of AEDPA.

Clearly we have violated Chief Justice Rehnquist's admonition that "Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution." *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal at 6 (Aug. 23, 1989) (retired Justice Powell presiding); *cf. McFarland v. Scott*, 512 U.S. 849, 857-58 (1994) (appointment of counsel on the eve of an execution date "would have been meaningless" unless the

[1] While the majority opinion is correct that we have been tracking Gosch's direct and collateral appeals in state and federal court for several years, *see McFarland* v. Scott, 512 U.S. 849, 852 n.1 (1994) (discussing Gosch's previously filed "skeletal" habeas petition and previous Texas policy in death penalty cases), none of the panel members, to my knowledge, have reviewed the state court record or state habeas evidentiary hearing in light of issues number 2 and 3, Gosch's ineffective assistance of counsel and his false testimony claim.

execution was stayed; "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims."). This case is not frivolous. At a minimum, issues number 2 and 3—whether Gosch received ineffective assistance of counsel and whether the State knowingly permitted false testimony—require thorough review of the underlying record. *See Mercer v. Armonstrout*, 864 F.2d 1429, 1431-32 (8th Cir. 1988) ("If the petition is not frivolous on its face, *the very essence of this court's duty is to study and research the points raised.* The severity and finality of the death penalty requires the utmost diligence and scrutiny of the court. . . . No judge can digest, retain, or apply these principles to a voluminous state court record without reflective study and analysis. To suggest that a life or death decision can be made by simply reading a petition is to advocate dereliction of judicial duty.") (emphasis in original).

I would, therefore, grant the stay of execution and hold in abeyance any ruling on a COA until a thorough review of the record is performed in light of the specific issues before us.

No. ____

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LESLEY LEE GOSCH

Petitioner,

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GARY L. JOHNSON, DIRECTOR
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Respondent.

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Supplement to Petition for Writ of Certiorari was served on counsel for Respondent by facsimile transmission to: Michael Skotnik, Capital Litigation Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 15th day of January, 1998. I further certify that all parties required to be served have been served.

Raoul Schonemann